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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Policy and Rules Concerning the)	
Interstate, Interexchange Marketplace)	
)	CC Docket No. 96-61
Implementation of Section 254(g) of the)	Phase I
Communications Act of 1934, as amended)	

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AMERITECH COMMENTS

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SUMMARY

Ameritech respectfully submits these comments in response to Sections IV, V, and VI of the Commission's Notice of Proposed Rulemaking (Notice) in the above-captioned proceeding. In those sections, the Commission seeks comment on three issues: (1) whether independent local exchange carriers (LECs) and Bell Operating Companies (BOCs) should be required to comply with the separate affiliate requirements of the Competitive Carrier Fifth Report and Order¹ in order to be treated as nondominant in the provision of out-of-region services; (2) how to define product and geographic markets for interstate, interexchange services; and (3) how to implement the geographic rate averaging and integration provision of the 1996 Telecommunications Act (the 1996 Act).

In its comments below, Ameritech argues that BOCs should be classified as nondominant in out-of-region services, regardless of whether they provide such services through a separate affiliate. Because BOCs could not possibly exert market power in the direct provision of out-of-region services, the separate affiliate requirements of the Fifth Report are wholly unnecessary. In addition, these requirements are inconsistent with the 1996 Act which pointedly omits out-of-region services from the list of services BOCs must provide through separate subsidiaries. Ameritech also supports elimination of separate affiliate requirements for independent LECs.

¹ Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fifth Report and Order, 98 FCC 2d 1191 (1984) (Fifth Report).

With respect to the market definition issues, Ameritech believes that the Commission's proposed approach to defining product and geographic markets is theoretically sound, subject to one caveat: Because of the geographic rate averaging requirements of the 1996 Act, for all practical purposes, there will necessarily be only one geographic market for interexchange services. Thus, while Ameritech does not oppose leaving open the theoretical possibility of identifying smaller relevant geographic markets, Ameritech is unaware of any such markets at the present time. The Commission should also clarify that the Department of Justice/Federal Trade Commission 1992 Merger Guidelines govern market definitions not only for interexchange services, but for other interstate services, including access services.

Finally, Ameritech supports the Commission's proposals for implementing the geographic rate averaging and integration provisions of the 1996 Act. In particular, Ameritech believes that states should continue to be responsible for implementing the geographic rate averaging provisions with respect to intrastate services, subject to the Commission's preemption authority. Ameritech also supports the Commission's proposal to enforce these provisions through certification requirements in the event the Commission forbears from requiring nondominant interexchange carriers to file tariffs.

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AMERITECH COMMENTS

A. INTRODUCTION

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they provide such services through a separate affiliate. Because BOCs could not possibly exert market power in the direct provision of out-of-region services, the separate affiliate requirements of the Fifth Report are wholly unnecessary. In addition, these requirements are inconsistent with the 1996 Act which pointedly omits out-of-region services from the list of services BOCs must provide through separate subsidiaries. Ameritech also supports elimination of separate affiliate requirements for independent LECs.

With respect to the market definition issues, Ameritech believes that the Commission's proposed approach to defining product and geographic markets is theoretically sound, subject to one caveat: Because of the geographic rate averaging requirements of the 1996 Act, for all practical purposes, there will necessarily be only one geographic market for interexchange services. Thus, while Ameritech does not oppose leaving open the theoretical possibility of identifying smaller relevant geographic markets, Ameritech is unaware of any such markets at the present time. The Commission should also clarify that the Department of Justice/Federal Trade Commission 1992 Merger Guidelines govern market definitions not only for interexchange services, but for other interstate services, including access services.

Finally, Ameritech supports the Commission's proposals for implementing the geographic rate averaging and integration provisions of the 1996 Act. In particular, Ameritech believes that states should continue to be responsible for implementing the geographic rate averaging provisions with respect to intrastate services, subject to the Commission's preemption authority. Ameritech also supports the Commission's proposal to enforce

these provisions through certification requirements in the event the Commission forbears from requiring nondominant interexchange carriers to file tariffs.

B. BOC AND LEC OUT-OF-REGION SERVICES ARE
NONDOMINANT REGARDLESS OF WHETHER THOSE
SERVICES ARE PROVIDED THROUGH A SEPARATE AFFILIATE

Part V of the Notice raises the issue of whether BOCs and LECs should be subject to the separate affiliate requirements of the Fifth Report in order to qualify for nondominant treatment of out-of-region services. Ameritech's comments focus primarily on the application of these requirements to BOCs. Ameritech's arguments, however, apply equally to independent LECs, and Ameritech believes that LECs, as well as BOCs, should be permitted to provide out-of-region services, without separation requirements, as nondominant carriers.

1. BOCs Do Not Have Market Power in Out-of-Region Services

The regulatory framework under which the Commission classifies carriers as dominant or nondominant was established in the Commission's Competitive Carrier proceeding. In that proceeding, the Commission defined dominant carriers as those possessing market power, and nondominant carriers as those lacking market power. The Commission described market power as the ability to control price in the marketplace -- that is, to sustain prices either unreasonably above or below costs:

We define a dominant carrier as a carrier that possesses market power. Market power refers to the control a firm

can exercise in setting the price of its output. A firm with market power is able to engage in conduct that may be anticompetitive or otherwise inconsistent with the public interest. This may entail setting price above competitive costs in order to earn supranormal profits, or setting price below competitive costs to forestall new entry by new competitors or to eliminate existing competitors. In contrast, a competitive firm, lacking market power, must take the market price as given, because if it raises price it will face an unacceptable loss of business, and if it lowers price it will face unrecoverable monetary losses in an attempt to supply the market demand at that price.²

The Commission reiterates this delineation of the dominant/nondominant framework in the Notice.³

Among the factors the Commission considers in determining whether a firm has market power -- and thus the ability to control price in the marketplace -- are: the number and size distribution of competing firms, the nature of barriers to entry, the availability of reasonably substitutable services, and whether the firm controls bottleneck facilities.⁴ With respect to this last criterion, the Commission has stated that control of bottleneck facilities exists "when a firm or group of firms has sufficient command over some essential commodity or facility in its industry or trade to be able to impede new entrants."⁵

² Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 (1980) (First Report) at 20-21.

³ Notice at para. 8 and note 15.

⁴ Id. See also First Report at 20-21.

⁵ First Report at 20-21.

Applying these four factors, it is self-evident that BOCs do not have market power in out-of-region services and that no separate affiliate requirement is necessary to prevent them from exercising market power. Indeed, given that the BOCs will enter the marketplace with no customers, no presubscribed lines, no traffic, no revenues, and little or no name recognition, it would be hard to imagine a stronger case for nondominance, both out-of-region and in-region.

Number and size of a carrier's competitors: BOCs will be competing against some 500 incumbent carriers, including four nationwide facilities-based carriers. One of these, AT&T, is the largest telecommunications company in the world, with total 1995 revenues of almost \$80 billion and toll revenues of over \$47 billion.⁶ It currently has over 100 million presubscribed lines, seventy percent of the nation's total, and its network handles over sixty billion calls annually.⁷ Another, MCI, has over 22 million presubscribed lines, and its 1995 revenues exceeded \$15 billion.⁸ A third, Sprint, reported net long-distance revenues of over \$7 billion in 1995.⁹ It serves almost ten million presubscribed lines with the nation's first and only 100% digital fiber optic network and claims as its customers 81% of the Fortune 500 largest United States industrial companies, as well as offshore-based multinational

⁶ Long Distance Market Shares, Fourth Quarter 1995, Industry Analysis Division, Common Carrier Bureau, FCC, March 1996 at Table 5; AT&T 1995 Annual Report at 2.

⁷ AT&T 1995 Annual Report at 25. In fact, if AT&T with its millions of customers and vast financial resources and name recognition is a nondominant interexchange carrier, it is self-evident that no carrier providing interexchange services can be dominant.

⁸ Long Distance Market Shares, Fourth Quarter 1995, Industry Analysis Division, Common Carrier Bureau, FCC, March 1996 at Tables 4-5.

⁹ Id. at Table 5.

corporations.¹⁰ Both MCI and Sprint have entered into global alliances that have armed them with billions of dollars in additional capital. Sprint also owns the nation's second largest independent LEC.

Entry Barriers: Due, in part, to the Commission's resale policies, entry barriers in the interexchange marketplace are low. This is best evidenced by the rapid growth in the number of carriers purchasing equal access -- from 169 in March 1986, to more than 500 as of March 1996.¹¹ Moreover, the incumbent facilities-based carriers have vast amounts of readily available excess capacity that would enable them to accommodate large numbers of new customers in relatively little time and at little investment. This excess capacity, like the absence of high entry barriers, constrains the ability of any carrier to exercise market power.¹²

Availability of Substitute Services: The Commission has already recognized that AT&T's competitors, singularly and collectively, offer a full range of high quality services that are fully substitutable for those of AT&T.¹³ The services of these carriers, combined with those of AT&T, will be fully substitutable for BOC services as well. Indeed, given that the BOCs have no

¹⁰ Id. at Table 4. See also Sprint 1994 Annual Report at 8.

¹¹ Compare Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, FCC, Feb. 10, 1993 at Table 22, with Long Distance Market Shares, Fourth Quarter 1995, Industry Analysis Division, Common Carrier Bureau, FCC, March 1996 at 3 and note 1.

¹² Competition in the Interstate, Interexchange Marketplace, 6 FCC Rcd 5880 (1991); Motion of AT&T Corp. to be Classified as a Nondominant Carrier, FCC 95-427 (released Oct. 32, 1995). See also Notice at note 121.

¹³ Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880 (1991) at paras. 37-40. See also Competition in the Interstate, Interexchange Marketplace, Notice of Proposed Rulemaking, 5 FCC Rcd 2627 (1990) at para. 54

out-of-region facilities of their own, they will necessarily be limited to reselling the offerings of incumbent carriers.

Control of bottleneck facilities: The Commission has defined bottleneck control as "when a firm or group of firms has sufficient command over some essential commodity or facility in its industry or trade to be able to impede new entrants."¹⁴ It is difficult to understand how a BOC could possibly impede new entrants in out-of-region markets, even assuming arguendo that BOCs have bottleneck control over in-region facilities. First, almost 90% of the calls of an out-of-region competitor will be handled completely outside the BOC's network. Thus, even if the BOC were intent on discriminating against out-of-region competitors, it would have scarce opportunity to do so. More significantly, in the real world, it is inconceivable that such discrimination could occur without detection. Any such discrimination would be a blatant violation of the BOC's equal access obligations, not to mention section 202 of the Act. Certainly if discrimination were so significant that it had an impact on a carrier's standing among customers, the carrier itself would be aware of it.

Moreover, the extent to which BOCs maintain any bottleneck control over in-region facilities is questionable. While the BOCs' competitors are fond of chanting the mantra "bottleneck control" whenever they sense an opportunity to seek competitive advantage, in truth, any bottleneck control the BOCs once had is quickly dissipating as a result of the Commission's expanded interconnection initiatives and the 1996 Act. The Act eliminates

¹⁴ First Report at 20-21.

not only legal barriers to local exchange competition, but also economic ones. Through the checklist requirements of section 251 and 271, the Act ensures that local exchange competition will develop quickly and on a sustainable basis. Not only are incumbent LECs required to provide interconnection, dialing parity, number portability, access to poles, conduits, etc., but also access to network elements and resale at wholesale rates.

These latter two provisions are particularly significant because they enable competing LECs to enter the market rapidly and with little capital investment. Indeed, the FCC 's requirement that long-distance carriers provide resale opportunities at retail rates is largely credited with eliminating barriers to entry in long-distance services. One could reasonably expect a requirement that local services be available for resale at wholesale rates, coupled with the availability on request of access to unbundled network elements, to have an even more pronounced effect on competition in the local exchange marketplace. Indeed, in reliance on the these provisions of the 1996 Act, within one month after enactment of the legislation AT&T had applied for authority to provide local exchange service in all fifty states.

These considerations negate any ability a BOC arguably might once have had to use to exert control of bottleneck facilities to anticompetitive ends. It should go without saying, therefore, that the BOCs do not have any ability to exercise market power through control of bottleneck facilities outside of their regions.

The BOCs' competitors in the long-distance marketplace will, no doubt, dispute this assertion. Citing to the practices of the pre-divestiture Bell

System or to statements directed at it, they will assert that the BOCs can discriminate in the provision of terminating access against out-of-region competitors and thereby damage the national reputations of those competitors. They will not explain in detail how such discrimination could occur without detection, but they will nevertheless ask the Commission to apply separate affiliate requirements or even stricter requirements to BOC out-of-region services. A few might even ask for dominant regulatory treatment.

These arguments should be perceived for what they are: transparent efforts to saddle new competitors in the marketplace with onerous regulatory burdens. The BOCs are not the pre-divestiture Bell System. Each has zero market share in interLATA services, not 95%. Their competitors in the long-distance market will not be fledgling new-comers, struggling to establish themselves with inferior connections and virtually no name recognition, but global giants with billions of dollars in revenues, hundreds of millions of customers, and well-established reputations. These carriers are more than able to fend for themselves in the marketplace, and the notion that a BOC could systematically, and without detection, discriminate against one of them is patently absurd.

The BOCs' competitors will undoubtedly likewise argue that the BOCs will be able to shift costs from their local exchange and access services to their long-distance offerings. They will not, however, explain how such cross-subsidization could occur under price cap regulation, particularly price caps without sharing. Nor will they explain why the Commission's cost allocation rules would be ineffective to prevent cross-subsidization, wholly apart from

price caps, given that those rules have been more than effective in numerous other contexts, including enhanced services and customer premises equipment, in preventing cross-subsidization.

In short, no credible argument can be made that a separate affiliate requirement is necessary to prevent a BOC from exercising market power in out-of-region services. The Commission should therefore rule that BOCs are nondominant in out-of-region services, whether they provide those services directly or through a separate affiliate.

2. A Separate Affiliate Requirement Would Be Inconsistent With the Intent of the 1996 Act

Conditioning BOC nondominance in out-of-region services on compliance with separation requirements would also be inconsistent with the intent of the 1996 Act. That Act specifies the services that BOCs must provide through a separate subsidiary. Out-of-region long-distance service is not one of them. While, admittedly, requiring a separate affiliate as a precondition for nondominant status is not the same as requiring it outright, that is a distinction without a difference. In reality, it is untenable for a BOC to compete in the marketplace as a dominant long-distance carrier, particularly given that the incumbent carriers in the marketplace, including AT&T, are accorded nondominant status. Therefore, any conditions the Commission establishes for nondominant status are de facto requirements.

The clear intent of the 1996 Act was to promote competition and eliminate unnecessary and intrusive regulations. The separate affiliate requirement for nondominant status is precisely the kind of superfluous

regulation the Act was intended to redress. Moreover, as the Commission has noted in the context of video services, Congress has recognized in the 1996 Act that new entrants in established markets deserve lighter regulatory burdens to level the playing field. The Commission should not ignore the plain language and clear intent of the 1996 Act. It should hold that BOCs may provide out-of-region interLATA services as nondominant carriers with or without a separate affiliate.

3. The Requirement is Also Unnecessary As To The Out-of-Region Services of Independent LECs

While Ameritech thus believes that the separate affiliate requirements should not be applied to the BOCs, Ameritech also supports elimination of these requirements for the out-of-region operations of independent LECs. Just as BOCs cannot exercise market power in out-of-region services, independent LECs cannot. Ameritech notes, in this regard, that the Commission adopted the separate affiliate requirement for independent LECs in 1984. The divestiture had just been completed, equal access was not yet a nationwide reality, and long-distance competition was in its infancy.

The competitive and regulatory environment has since completely changed. As noted, over 500 carriers operate in the marketplace today, four with nationwide facilities-based networks. These carriers account for billions in revenues, millions of customers, and have well-established reputations as providers of high quality global services. Moreover, the Commission and numerous state commission have adopted price cap regulation and sophisticated cost allocation rules. Finally, like the BOCs, LECs are required to open their local exchange and access services to competition. Indeed,

whereas the concept of a competitive access provider (CAPs) did not exist in 1984, CAPs are now making inroads in LEC markets and are poised, along with interexchange carriers, cable operators, public utilities, and others, to enter the local exchange marketplace. Given these changes, the separate affiliate requirements are no more defensible for independent LECs than they are for BOCs and should promptly be eliminated.

C. PRODUCT AND GEOGRAPHIC MARKET DEFINITIONS

The Commission also seeks comment on how to define product and geographic markets for interexchange services. It tentatively concludes that it should follow the U.S. Department of Justice/Federal Trade Commission *Merger Guidelines* for defining relevant markets.¹⁵ Under those guidelines, two products are in the same product market if a small, but significant and nontransitory increase in the price of one would cause enough buyers to shift their purchases to the other as to render the increase unprofitable. Likewise, two locations are in the same geographic market if a small but significant and nontransitory increase in the price of a product at one location one would cause enough buyers to shift their purchases of that product to the other location, so as to make the price increase unprofitable.¹⁶

At the same time, however, the Commission acknowledges that it would be impracticable to identify and analyze all relevant product and geographic markets using these definitions. In addition, it notes that, for

¹⁵ See Notice at para. 41.

¹⁶ *Id.* at paras. 44-48.

various reasons, such an exercise would be pointless. Therefore, the Commission proposes to address whether a particular service or group of services constitutes a separate product market only if there is credible evidence suggesting that there is or could be lack of competitive performance with respect to that service or group of services. Similarly, the Commission proposes to examine a particular geographic market for the presence of market power only if there is credible evidence suggesting that there is or could be a lack of competition in that market that is not mitigated by geographic rate averaging requirements.

Ameritech believes that the market definitions embodied in the Merger Guidelines are fundamentally sound. Ameritech also agrees that it would be impracticable and unnecessary to attempt to define each and every product and geographic market using these definitions. Particularly in light of the geographic averaging provisions of the 1996 Act, there would appear to be no reason for the Commission to recognize anything other than a single, nationwide geographic market for interstate, interexchange services. That is because, as the Commission recognizes, even if a carrier has market power in a particular geographic market, that carrier must price its services in that market at the same rates as its services in other geographic markets. Thus, the benefits of competition in other geographic markets inure to customers in the less competitive market. For all practical purposes, then, there would appear to be only one geographic market for interstate interexchange services.

While, subject to that caveat, Ameritech supports the application of the Merger Guidelines to interstate interexchange services, the Commission should also clarify that these guidelines will be used to assess market power

or the lack thereof in other services, including interstate access services. Insofar as the Merger Guidelines are of general application, they are no less valid in the context of access services as interexchange services, and there could be no justification for applying them in one context, but not the other. Thus, just as the Commission indicated its intention to consider whether a specific interexchange service constitutes a separate product market, and whether a specific location constitutes a separate geographic market for purposes of market power analysis, the Commission should likewise undertake such inquiries in the context of interstate access services when there is credible evidence to support such analyses.

D. GEOGRAPHIC RATE AVERAGING AND INTEGRATION

The third major issue on which the Commission seeks comment in Phase I of this proceeding is how to implement the geographic rate averaging and integration requirements of section 254(g) of the 1996 Act. The Commission proposes to incorporate its existing policies into a new rule reflecting the statutory requirements. It suggests that states would be responsible for implementing the geographic averaging requirements for intrastate services, subject to the Commission's preemption authority. In addition, noting its proposal to forbear from requiring nondominant interexchange carriers to file tariffs, it proposes to require providers of interexchange telecommunications services to certify their compliance with the rate averaging and integration requirements.

Ameritech supports these proposals. The Commission's proposed rule and implementation mechanism is consistent with the 1996 Act and its

legislative history. Indeed, as the Commission notes, the legislative history of section 254(g) explicitly manifests Congress' intent that states shall continue to have primary responsibility for enforcing the geographic rate averaging requirements with respect to intrastate services, so long as those rules are not inconsistent with FCC rules and policies.¹⁷ Moreover, in the event the Commission forbears from tariff filing requirements, self-certification would appear to be the most appropriate enforcement mechanism.

E. CONCLUSION

For the reasons discussed above, the Commission should rule that BOCs and LECs may provide out-of-region services on a nondominant basis without complying with the separate affiliate requirements of the Fifth Report. The Commission should generally apply the Merger Guidelines in analyzing product and geographic markets for all interstate services, subject to the caveat that there is a single nationwide geographic market for

¹⁷ Conference Committee, Joint Explanatory Statement on the Telecommunications Act of 1996, 104th Cong., 2nd Sess. at 129.

interexchange services due to the geographic rate averaging requirements of the 1996 Act. Finally, the Commission should adopt its proposals for implementing the geographic rate averaging and integration provisions of the Act.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Gary L. Phillips", written over a horizontal line.

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